NURUL RABIHAH ABDUL RAHMAN v. KERAJAAN MALAYSIA & ORS

HIGH COURT MALAYA, TAIPING
NOOR RUWENA MD NURDIN JC
[CIVIL SUIT NO: AB-21NCVC-3-04-2020]
9 JUNE 2023

Abstract – *Not having a choice to turn away patients like the private hospitals should not be a reason by the Government hospitals to give substandard treatments to their patients. If such reason was employed, it can be considered as bad faith on the part of the Government hospitals which might warrant aggravated and exemplary damages to be awarded against the Government hospitals.*

TORT: *Damages – Assessment – Negligence – Medical negligence – Claim for general, special, aggravated and exemplary damages – Government hospital ('hospital') admitted to liability – Claimant suffered third-degree perineal tear after going through labour process at hospital – Negligence by surgeon who conducted repair on claimant's injury led to complications – Treatments deteriorated, among others, claimant's physical and mental health and sex life – Quantum of damages to be awarded to claimant*

The plaintiff was a patient of the Taiping Hospital ('hospital'), while the first and second defendants, respectively, were the Government of Malaysia and the Director of the hospital. The rest of the defendants were the doctors and nurse who had attended to the plaintiff. Due to suspected 'leaking liquor', the plaintiff was admitted to the hospital. On 3 May 2017 ('date of incident'), the plaintiff went into labour, and a healthy baby girl was born. However, after the third stage of the labour, it was discovered that the plaintiff had sustained a third-degree perineal tear, which led to a sphincter injury. After the matter was referred to a surgeon, the said injury was repaired. The plaintiff was put on antibiotics for two weeks and laxative syrup to prevent wound breakdown. The prescription of laxative syrup was stopped after the plaintiff complained of loose stools and inability to control motion. The plaintiff was discharged from the hospital on the evening of 5 May 2017. On 16 May 2017, the plaintiff was re-admitted to the hospital due to wound breakdown. A perineal examination showed that the whole length of sutures had opened until the anal sphincter. *Via* a consultation, the plaintiff was told to go for an examination under anaesthesia and defunctioning sigmoid colostomy ('colostomy'). The said procedures were conducted on the plaintiff on 18 May 2017. After it was discovered that the stoma was functioning well, the plaintiff was discharged. Subsequently, the plaintiff was required to attend follow-up sessions at the Alor Setar Hospital. There, the plaintiff was told to delay the sphincter injury repair and was only advised

about the care and management of the stoma bag. This caused the plaintiff to request for a second opinion from other specialist hospitals. The plaintiff decided to refer the matter to the PPUM Colorectal Clinic ('PPUM'). At PPUM, after an endoanal ultrasound assessment was performed on the plaintiff, the plaintiff was offered to undergo either graciloplasty or sacral neuromodulation, a procedure which involved the insertion of a pacemaker into the anal area to stimulate the nerves and mimic the natural muscle contractions ('SN method'). The price of the pacemaker was RM65,000 (not including surgery). The plaintiff had gone through the graciloplasty, but not the SN method. Nonetheless, after a report of the defendants' independent internal inquiry on the plaintiff's case ('inquiry report') was disclosed to the plaintiff, it was discovered that the surgeon who had made the repair of the sphincter injury was inexperienced in handling a third-degree perineal tear. Further, the classification of the injury had also been erroneously made, as the injury was first classified as a fourth-degree perineal tear, before it was amended to a third-degree perineal tear. Aggrieved, the plaintiff commenced a suit against the defendants for medical negligence. As the defendants, *via* a consent judgment, had admitted to liability, the only issue that arose in determining the suit was pertaining to the quantum of damages to be awarded to the plaintiff.

Held (allowing suit):

(1) *Via* the medical experts, the perineal tear suffered by the plaintiff was substantial because she had to undergo a sphincter repair within 24 hours of sustaining the injury. From the inquiry report, there were weaknesses in the management of and in employing the damage control measures in treating the said injury which had caused further complications to the plaintiff. From the medical records, the plaintiff had suffered from depression. It was confirmed by PW4 that the plaintiff had scored moderately high in the categories of sadness, pessimism, loss of pleasure, self-dislike, crying, loss of energy, concentration difficulty and tiredness or fatigue. When the medical records were prepared, the plaintiff had undergone five psychotherapy sessions. Further, the plaintiff also posited that she could not care for her daughter while she was treated, and her sexual relationship with her husband had deteriorated due to her condition. Considering these and the physical and mental anguish and disabilities and all the ordeal the plaintiff had to endure as well as not knowing whether she would recover from her condition, the plaintiff was awarded with RM1,000,000 for general damages for pain and suffering and loss of amenities of life. (paras 35 & 37-39)

(2) PW9's evidence was more convincing than DW1's evidence and there were doctors in Malaysia who could carry out the SN method. The plaintiff should be given the chance to return to her normal life; due to

the plaintiff's young age, if would allow the plaintiff to have more children if the pacemaker was successfully employed. The use of the SN method was the next step towards putting the plaintiff back in the position she had been but for the accident. There was also cost savings as the SN method could be carried out in PPUM. Therefore, the total costs allowed for the plaintiff's future medical treatment, which included the testing of the pacemaker, was RM100,000. Other than that, for the avoidance of doubt in case the SN method was unsuccessful, the plaintiff was given the liberty to re-apply to remove the pacemaker and undergo colostomy and the costs of stoma bags as well as its incidentals were also allowed. (paras 40-41 & 61)

(3) In respect of the costs for removal of stoma bag, this was necessary considering that the court had allowed the pacemaker to be procured for the plaintiff's use. The amount of RM6,000 was allowed for the plaintiff. Whereas in respect of the costs of stoma bags pending the implant of the pacemaker, the costs allowed was RM300 for 12 months, *ie*, RM3,600. (paras 42 & 43)

(4) The defendants did have the requisite intention to act in bad faith against the plaintiff. It appeared that the defendants' employees did not have the right credentialing to carry out the sphincter repair in the first instance and the injury could have been due to the employees' misjudgement or mishandling of the delivery process. There was evidence that the defendants' employees had acted or behaved inappropriately which led to the negligence and injury suffered by the plaintiff. Moreover, taking into consideration that the defendants' argument, that they do not have the choice to turn away patients unlike their counterparts in the private hospitals, could not be accepted because that could not be a reason for giving substandard treatments to patients and that the defendants owed a duty of care to the plaintiff as soon as she stepped into the hospital, regardless of how many treatments were given to her, aggravated and exemplary damages in the amount of RM300,000 was awarded to the plaintiff. (paras 49, 51 & 52)

(5) In respect of the plaintiff's claim for special damages which were incurred before the suit was filed, the following were awarded: (i) RM5,219.80 for expenses incurred for treatments and medications at the hospitals; (ii) RM4,000 for travelling expenses from plaintiff's house to the hospitals; (iii) RM2,934.50 for costs of stoma bag, its adhesives and care products; (iv) RM1,500 for caregiver costs by immediate family member(s); (v) RM180 for nutrition costs; and (vi) RM6,100 for costs of preparing the medical opinion report by Dr Milton Lum Siew Wah. Whereas for the plaintiff's claim for special damages which were incurred after the suit was filed, such costs were allowed: (i) RM700 for postal order for attendance in court of plaintiff's witnesses except PW6;

(ii) RM7,500 for solicitors' attendance in court; (iii) RM6,500 for attendance in court for expert witness PW5 including *via* Zoom; (iv) RM11,000 for attendance in court of expert witness PW9; (v) RM50,000 for advocacy costs; and (vi) RM10,000 for claim for pre-action discovery. (paras 55 & 57)

Case(s) referred to:

Abda Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd [2001] 8 CLJ 1 HC ***(refd)***
Bujang Mat & Anor v. Lai Tzen Hai & Anor [2004] 4 CLJ 127 HC ***(refd)***
Chai Yee Chong v. Lew Thai [2004] 2 CLJ 321 CA ***(refd)***
Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2018] 3 CLJ 427 FC ***(refd)***
Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC ***(refd)***
Liong Thoo v. Sawiyah Hj Sirat & Ors [1981] CLJ 126; [1981] CLJ (Rep) 171 HC ***(refd)***
Mohd Ridzwan Abdu l Razak v. Asmah Hj Mohd Nor [2016] 6 CLJ 346 FC ***(refd)***
Nur Syarafina Sa'ari v. Kerajaan Malaysia & Ors [2019] 9 CLJ 246 HC ***(refd)***
Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors [2015] 1 CLJ 825 HC ***(refd)***
Sheela Christina Nair v. Regency Specialist Hospital Sdn Bhd & Ors [2016] 9 CLJ 267 HC ***(refd)***
Yang Salbiah & Anor v. Jamil Harun [1981] CLJU 106; [1981] 1 LNS 106 FC ***(refd)***

For the plaintiffs - Muhamad Hisham Marzuki & Goh Chin Han; M/s Baharum, Suhaimi & Hisham
For the defendants - Muhammad Fauzi Md Yusof; SFC

Reported by Syamim Ariffin

JUDGMENT

Noor Ruwena Md Nurdin:

[1] This was a medical negligence suit to determine the quantum to be awarded to the plaintiff after a consent judgment on liability was recorded on 23 March 2021 as per encl. 28 before the learned Judicial Commissioner (as he then was). It was also agreed that the plaintiff would withdraw the suit against the second to tenth defendants with no order as to costs. After the trial on quantum was completed and after hearing the submissions of the parties, on 19 January 2023, this court awarded general, special and aggravated damages to the plaintiff, and the defendants were ordered to pay a total amount of RM1,505,234.30 including costs ("the said decision").

[2] Unsatisfied with part of the said decision, the defendants filed a notice of appeal on 17 February 2023. Subsequently on 10 May 2023, the plaintiff filed a notice of cross-appeal against part of the said decision. This grounds of judgment contains the court's rationale in arriving at the said decision.

Facts Of The Case

[3] The following facts were obtained from the report of the Government expert, Dr Jasiah Zakaria (DW1) in respect of the plaintiff's injury at the material time. In 2017, the plaintiff was a 26-year-old first-time mother who sought treatment at the Hospital Taiping ("the hospital") when she was about to give birth to her daughter. She was admitted to the hospital at 39 weeks of gestation period on 2 May 2017 at 4.15pm for suspected "leaking liquor". Initial assessment by the attending team did not reveal a definitive pre-labour rupture of membrane and she was managed conservatively. On 3 May 2017, the plaintiff progressed into labour and was sent to the labour room at 12pm. She was attended to by a houseman and supervised by a staff nurse. The first stage of labour lasted for seven hours and 30 minutes and the second stage lasted for 40 minutes. She gave birth at 3.10pm to a healthy baby girl weighing 3.65 kg. Allegedly, there were no documented difficulties during labour.

[4] Following completion of the third stage, immediate recognition of perineal tear extending into the rectal mucosa and lax anal tear was made, and findings confirmed by an O&G Medical Officer (MO) on duty at 3.30pm. Impression was that of a fourth-degree tear and the case was referred to a surgeon for assessment and repair of the perineal tear. There, they detected a sphincter injury and referred the plaintiff to the surgical department for further management. The repairs to the tear was done on 3 May 2017 at 5.04pm by a surgeon in the maternity operating theatre. Post-operative plan was for the plaintiff to be on antibiotics for two weeks and laxative syrup to prevent wound breakdown and she was to be referred to physiotherapy for pelvic floor muscle exercises. The plaintiff was informed about possible complications of obstructive anal sphincter injury (OASI) including flatus and bowel incontinence and future delivery mode would depend on her symptoms. However, on 5 May 2017 at 3am, the plaintiff complained about loose stools and inability to control motion. A rectal examination revealed lax anal tone and the laxative syrup was stopped. On the evening of the same day, the plaintiff was discharged from hospital and given antibiotics for two weeks and lactulose 15ml to be taken at night. At that time, she was still having loose stool but no bowel incontinence detected. Ante-natal Clinic (ANC) follow-up was to be done in two weeks on 23 May 2017.

[5] Nevertheless, on 16 May 2017, the plaintiff was referred to the hospital by Columbia Asia Hospital, Taiping for wound breakdown. A perineal examination revealed the whole length of the sutures had opened up until the anal sphincter, the wound was clean and no pus discharge seen. The anal sphincter was lax and she had to be referred to the surgical team and perineal repair monitored. The plaintiff was supposed to undergo an Examination under Anaesthesia (EUA) on 17 May 2017 for "KIV repair and KIV sigmoid colostomy". However, the next morning, the surgeon did not proceed as planned and the plaintiff was instead reviewed by a consultant and

KIV referral to the colorectal team. The consultant discussed with another colorectal surgeon (Hospital Sultanah Bahiyyah, Alor Setar) and a decision was made that an operation to re-do the anal sphincter injury repair was not advisable within two weeks of the first operation. More discussions were needed, and to consult "colorectal team or urogynecologist". The plaintiff was given medication in the meantime and she was explained about the injury and post-operative plan by the consultant. It was explained to her that the EUA was needed to check the degree of tear and that she may need defunctioning sigmoid colostomy to be done. Complications of the colostomy was also explained to the plaintiff.

[6] The EUA and defunctioning colostomy was conducted on 18 May 2017 by a hospital consultant. It was found that there was "perineal skin breakdown and eroded inward, no healthy skin to approximate, anal tone laxed. Thin septum between vagina and rectal mucosa. Sutures over vaginal mucosa intact and granulation tissue seen.". Findings was updated to a consultant surgeon and a decision was made to perform a defunctioning stoma. It was noted in the hospital report that the "decision for colostomy was appropriate in view repair was very recent and failure rate will be high and skin not able to approximate. Defunctioning colostomy to divert fecal contamination and promote perineal wound healing"). Subsequently, after the colostomy, the plaintiff was reviewed by the surgical MO on 19 and 21 May 2017 where the stoma was functioning well and she was allowed discharge. Follow up sessions were arranged and also a colorectal appointment at the Alor Setar Hospital on 23 May 2017.

[7] There she was told to delay the sphincter injury repair "if developed wound break down due to high failure rate" and they only advised about care and management of the stoma bag. The plaintiff requested to have a second opinion from other specialist hospitals because she wanted further intervention and did not want to wait for the conservative management of the wound which may take a longer time. She was referred to an adventist hospital in Penang on 3 July 2017 to obtain a second medical opinion where it was found "perineal wound still wet with slough and sphincters weak. Not suitable for stoma closure". On 6 July 2017, the plaintiff went to the Hospital O&G clinic for follow up and complained about passing motion. Upon examination, it was found that there was a small gaping perineal wound (1cm x 0.5cm), wound edge healthy and the colostomy was functioning. At a follow up on 19 July 2017, the plaintiff was referred to PPUM Colorectal clinic on 7 August 2017. This was just part of the numerous follow-ups that the plaintiff had to undergo in order to find a permanent solution to her condition.

[8] On 14 September 2017 at PPUM, endoanal ultrasound assessment showed 90-degree loss of the internal sphincter (10 to 2 o'clock). This was in keeping with the mixed injury, where the functional loss was more predominant than the anatomical loss. Therefore, it was suspected that there

was an "element of traction injury to the pudendal nerve at the time of OASI causing a neurogenic-predominant loss of function". On 4 December 2017, she was seen and offered graciloplasty or sacral neuromodulation (SN) by the PPUM Plastic and Colorectal team. SN is a sacral nerve stimulation program where a medical device (pacemaker) is inserted into the anal area to stimulate the nerves to mimic natural muscle contractions after graciloplasty is done. She was told that the SN device would cost around RM65,000 (not including surgery). On 21 June 2018 the PPUM plastic surgery team performed a graciloplasty on the plaintiff "due to failed overlapping repair" which was "due to significant EAS injuries and associated nerve injury". It was noted in DWI's medical report, "If failed graciloplasty, sacral nerve stimulation program. If fail patient will end up with permanent stoma".

Assessment Of Damages

[9] The trial commenced before the previous learned Judicial Commissioner where eight witnesses for the plaintiff had been called to testify. On 22 April 2022, the trial continued before me with the nineth witness for the plaintiff and then, with only one witness for the defendants. I also had the opportunity to hear from the plaintiff herself before the trial ended about the colostomy done on her and its care and management. These will be elaborated later in this grounds. The plaintiff witnesses who testified at the trial were as follows:

(i) Nurul Rabihah binti Abdul Rahman (PW1), plaintiff;

(ii) Ahmad Saufi bin Ameron (PW2), plaintiff's husband;

(iii) Dr Khairul Anwar bin Mohd Saman (PW3), Head of Department Obstetric & Gynaecology, Columbia Asia Hospital, Taiping;

(iv) Pn Masyitah binti Minhad (PW4), Psychiatry Unit Officer, Hospital Raja Permaisuri Bainun, Ipoh;

(v) Dr Milton Lum (expert witness) (PW5), Obstetrician & Gynaecologist;

(vi) Dr Joyce Lee Chai Yuit (PW6);

(vii) Dr Nora Abdul Aziz (PW7), Consultant Colorectal Surgeon, PPUM;

(viii) Dr Kong Chee Kwan (PW8), Plastic Surgeon, PPUM; and

(ix) Dr Mohamed Akhtar bin Mohamed Ditali Qureshi (PW9), Obstetrician & Gynaecologist, Sunway Medical Center.

[10] The defendants' sole witness was Dr Jasiah Zakaria (DW1), Consultant General Surgeon and Head of Colorectal Department, Hospital Tuanku Jaafar, Seremban. This witness did not examine the plaintiff and also prepared the report entitled expert opinion on Nurul Rabihah Abdul Rahman

dated 14 September 2020 (refer to CBOD1, Part A, pp. 1A-1F). DW1 was appointed by the Ministry of Health as its expert for this case on 15 July 2020. Both PW9 and DW1 who testified before me were experts who gave their opinions about the plaintiff's condition, and a medical device which was very costly that would be required as part of her treatment. This will also be elaborated further in this grounds.

Internal Inquiry

[11] The plaintiff lodged a formal complaint on the Ministry of Health (MOH) website after as seen in p. 1 of CBOD1, on 14 February 2018. This was after she had sought treatment at PPUM and it had been more than ten months since she had had the colostomy done. However, she alleged that she did not receive any feedback from the defendants.

[12] The defendants had conducted an independent internal inquiry (committee) on 1 November 2018 at the hospital whereby the plaintiff and her husband attended the meeting. Pursuant thereto, she requested for the report of the committee through her solicitors (pp. 24 to 25 of CBOD1). Nevertheless, the defendants would not supply the documents to her despite her right to obtain such documents. The plaintiff sought legal advice and her solicitors requested for her medical records and relevant reports.

[13] On 15 September 2019, the plaintiff received an email from a Dr Surenthiran a/l Panjanathan from Cawangan Medicolegal, Bahagian Amalan Perubatan of the MOH who requested for documents pertaining to bills and receipts of stoma bag purchase, bills and receipts of the treatments and surgeries done, appointment cards of the Hospital, HRPB and PPUM as well as other costs incurred (CBOD1 p. 2). Subsequent email communications between the plaintiff and Dr Surenthiran ensued (pp. 3 to 8 of CBOD1) wherein she was informed that the MOH was in discussion with the Legal Department of the Ministry and the AGC on an *ex gratia* compensation. However, the plaintiff complained that it took too long for the MOH to investigate the complaint and she was not receiving any money which was badly needed for her treatments. It was alleged that she was contacted by Dr Surenthiran that an *ex gratia* compensation would be paid provided that she did not commence legal action against the defendants. But, nothing materialised from the communications.

[14] Hence, she commenced legal action in the Taiping High Court to obtain a court order for discovery of her medical records and reports *vide* Originating Summons No. AB-24-1-03/2020. The plaintiff also filed this writ action in April 2020 pending receipt of the medical records and reports. Upon receipt of the court order dated 25 June 2020, the documents were given to the plaintiff (pp. 29-329 of CBOD1). The much awaited laporan jawatankuasa penyiasatan bebas on 1 November 2018 ("the report") was also made available (pp. 342-365 of CBOD1). The report stated, amongst others,

that the surgeon who made the first repair within 24 hours of the injury being reported was not experienced handling a complicated third-degree tear alone and she should have called for further assistance (at pp. 352 of CBOD1). The classification of the injury may have been erroneously made (and there was a correction in the note from fourth degree tear re-graded as third-degree tear). The documentation of the surgery was poor and inadequate. The surgeon did not have the appropriate credentialing to do the surgery. Third degree tears should have been handled by the obstetric team while fourth degree tears, if complicated, can be referred to the colorectal team. It was also found that there was lack of communication by surgical team and lack of soft skills by the staff nurse who attended to the plaintiff at the ward. They were also unable to identify the personnel at head end assisting the delivery.

[15] In regard to the follow up checks by the Klinik Kesihatan, the wound was found dirty on day five post-partum by nursing staff. She was referred to the MO at the Klinik Kesihatan on day six post-partum but unfortunately was not referred back to the hospital until the plaintiff sought treatment at Columbia Asia Hospital and was referred urgently from there almost two weeks later. If the case had been referred earlier, the needful may be done earlier and the wound could have healed better. The case was not consulted with the visiting family medicine specialist as there was no visitation during that time (refer to p. 353 of CBOD1). The report concluded that the "third degree perineal tear is a known complication of vaginal delivery and the causes are multi factorial. However, there were weaknesses in the management of and damage control measures that were undertaken to treat perineal tear that had brought about further complications for the patient. The perineal tear could have been managed more efficiently.". More disturbing was the fact that the report raised a question about alteration in medical notes; addition of notes in ante-natal/post-natal note from health clinic and illegible handwritings.

[16] The plaintiff's solicitors then sought the medical opinions of two other experts, namely, Dr Milton Lum Siew Wah (PW5), Consultant Obstetrician and Gynaecologist and Dr Mohamed Akhtar bin Mohamed Ditali Qureshi, Consultant General and Colorectal Surgeon of Sunway Medical Center (PW9). Their reports were as per pp. 372 to 415 and 369 to 371 of CBOD1, respectively. These reports were given to the defendants. Then, the writ and statement of claim were amended (pursuant to a notice of application filed) after the experts' reports were obtained. The amended defence and amended reply to defence were also filed accordingly. Subsequently, the defendants admitted liability and the consent judgment was recorded (encl. 38).

[17] Regretfully, the report was only disclosed upon receipt of the court order in June 2020 and even then, the defendants had filed their defence on 23 July 2020, despite knowing the contents of the report. The defence was later amended and filed on 22 October 2020. The defendants in the defence

and amended defence denied any liability and this had contributed in the delay of the proceedings (the civil suit). If the defendants had admitted their liability earlier, the plaintiff could have received adequate compensation in order for her to pursue the full treatments she required. It was only after two years of the fateful day that the Ministry "talked" about a settlement and this was more than a year and a half since the plaintiff lodged a formal complaint with the Ministry. Meanwhile, the plaintiff carried on with the stoma bag which she claimed caused her so much difficulties and discomfort. While I have summarised the events leading up to the cause of action against the defendants from the facts ascertained in the report and DW1's report, I have not touched upon the plaintiff's own testimony as well as the evidence given by the other witnesses. These will be dealt with later, accordingly.

Evaluation And Findings Of The Court

[18] The trial was to assess the damages to be awarded to the plaintiff, however, the court had to look at all the evidence adduced, even those that centred upon the defendant's liability as stated in the report. This was relevant because the damages sought included general and aggravated as well as special damages.

[19] The court heard the evidence of the experts relied on by the plaintiff to support her case. PW5 mainly testified about the breaches in the procedures found by the independent inquiry where his report largely concurred with the findings in the report. He gave evidence as follows:

MILTON	As far as sexual effects, there is nothing mentioned in the medical records. I come back to the study that I read in the International Journal in 2020. This was a study in Australia where they viewed the incidents and prevalence of these effects in 210 women 4 years after they had the perineal tear.
YA	Yes.
MILTON	And of these women, 54% still had complications 4 years after the event.
MILTON	Of which 48% had another pregnancy but of those who had another pregnancy, about half were affected in their delivery choices and a one third had a caesarean section. 40% of these women, the total number 4 of 210, had no more pregnancies. And more than 36% stated that the perineal tear affected their decision not to have future pregnancies. It is
YA	Statement? So statistically what is the outcome?
MILTON	The outcome is -
YA	It is more prevalent.

MILTON A lot of people, 40%, did not have any -

YA No pregnancy.

MILTON And of these 40%, probably more than a third stated that the injury affected their decision to have another pregnancy.

YA Alright.

MILTON So I don't know how much it affected this lady, as far as the sexual effects are concerned, as you know, when you have a faeces coming out of vagina, definitely would affect one's sex life.

[20] PW9 was the expert who had seen the plaintiff and from his experience and opinion, recommended that she is to be given a chance to have a go at the SN method. Seeing that she had already undergone graciloplasty, which was only half of the full treatment to be attempted, the plaintiff being a young woman and had a whole life ahead of her, PW9 viewed that SN would complete the treatment and had a high chance of success. His evidence was, *inter alia*, as follows:

S9: Dr can you explain to the court using of the pacemaker to the Plaintif?

J: The muscle that they have used is the muscle from the thigh so this muscle have got different muscle from anus sphincter. So in order for us to use this muscle we need a special electronic device that would help the muscle contract and relax, and the device is called pacemaker. It has to be implanted in the patient and the wire go into the muscles under the skin and the pacemaker is place in labia close to vagina. So the patient will be able to over many months even years, to teach muscle how to contract and relax.

S10: Dr, in using pacemaker is there lifespan for one patient for the device?

J: Most of these devices, relatively is new it means it's only be use in last 20 to 30 years I'm not aware of lifespan but certainly there is possibility the pacemaker may need to be changed after the period of time.

S11: Can you explain to the court, when the patient chose to use the pacemaker, is there any maintenance for the patient to maintain the device?

J: Generally speaking, they tend to use a magnet that used by a patient to help the device switch on and off initially but other than no other maintenance is required. But the patient is required for regular follow-up with the university programme, PPUM follow up in regular basis in order to ensure everything is working

S12: Dr, can you share to the court from your experience how much the expected cost for follow up basis?

J: For this colostomy procedure the last I checked is more than a year ago, the device alone would cost somewhere range RM65,000 to RM75,000 that is for the device alone. Then including the surgery, the implant the device you are probably looking approximately RM100,000, that is for the surgery and the device and there subsequently outpatient visit that would be charge approximately RM100 per visit. Yes the cost is including the device, the surgery and all the hospitalization would be in range RM100,000. When I say surgery I mean hospitalization, medication, anesthesia, surgery, and all that included would be in region of about RM100,000.

S23: Dr from your experience, explanation, by using the stoma bag can you estimate for female patient with the same injury, the lifespan I mean the normal lifespan for the patient?

J: This one is the difficult one to calculate because the RM300-RM350 is the current cost and this cost will increase because she is a young lady we will estimate that she would survive for another 50-55 years. So she would be required this cost monthly for a rest of her life if she have the stoma bag. That excluding potential implications associated with the stoma bag so you have to multiply this by 12, then I suppose you could add inflation figure 6-8% per year and multiply that 50-55.

S24: Dr, from your examination on the patient itself, can you tell the court or confirm that the patient is total permanent disabled?

J: It's difficult to say at the moment because she doesn't have the pacemaker but if the pacemaker fails, then yes she can be considered disable permanently.

[21] PW8 testified that with the type of injuries sustained by the plaintiff, recovery would not normally take more than a year. Therefore, if the injuries did not heal after a year, he stated there must be "something wrong inside.". He explained that, based on the investigation conducted and discussions, the colorectal and plastic surgery team decided that graciloplasty was the best treatment for the plaintiff. PW8 admitted he conducted the surgery known as gracilis flap. The surgery was necessary because there was a lax of muscle since the muscle was torn. The muscle from the thigh was used to replace the sphincter muscle. However, the graciloplasty was only partly successful. The lax muscle was closed but the function could not be restored.

[22] At that point of time, the treatment had not been completed and there was on-going follow up. Despite that and physiotherapy, due to the length of time of more than a year, the team concluded that the surgery was unsuccessful. It could be considered that the anal sphincter tear was a total permanent disability to the patient. He said that the new muscle must be exercised to enable it to regain its function (physiotherapy). He was not aware if the plaintiff had undergone physiotherapy as her follow up sessions were with the colorectal team.

[23] Both PW7 and PW8 testified that there was defect *ie*, no internal anal sphincter from 10 o'clock to 2 o'clock position. Without the internal sphincter muscler, it resulted in incontinence. PW7 explained the difference between internal and external sphincters. If it functioned well, there would be no loose continent even during sleep as the internal sphincter had its own tone, which in this case was lax due to the tear. The SN employed a device like a pacemaker that would stimulate the nerves so that the nerves become more sensitive. It was hoped that the sensitivity of the nerves, the pelvic flow would be able to control the fecal incontinence.

[24] The colorectal team would conduct a test first on the intended patient with the SN using a temporary implant and the costs of testing was around RM20,000 whereas a permanent device cost around RM60,000, depending on the supplier too. The costs of implant is subject to estimation by the supplier. There would also be follow-up maintenance and servicing as well as infection issues. The implant also needed to be adjusted according to the patient's tolerance. According to PW7, the procedure has never been done at PPUM. The reports prepared by PW7 and PW8 are at pp. 367 and 340-341, respectively, in CBOD1.

[25] The court noted the evidence of DW1 who testified that in her opinion, the SN should not be employed to treat the patient because nerve simulation, which was another method, was more practical and because the plaintiff should continue further with biofeedbacks and physiotherapies. Her evidence in that regard was similar to that of PW7. In her witness statement marked as PSD1, DW1 stated:

> S: Boleh Dr jelaskan kepada Mahkamah ini, adakah selepas pembedahan tersebut, keadaan Plaintif boleh kembali seperti sedia kala?
>
> J: lebih kurang 40 peratus pesakit yang menjalani pembedahan mengalami masalah 'anal incontinence' dan selalunya minor.
>
> S: Adakah 3rd degree tear ni biasa berlaku
>
> J: Incidence 0.6%-11 % of vaginal delivery
>
> ...
>
> S: Adakah Plaintif telah dirawat dengan sempurna di HT?
>
> J: Ya dari segi kecederaan ianya dikesan dan plaintif menjalani pembedahan di bilik bedah dalam keadaan segera.
>
> Tidak dari segi perineal repair tersebut, pembedahan dijalankan oleh pakar bedah yang tiada pengalaman merawat kes sebegitu dan berlaku perbezaan diagnosis antara pakar obstetric (4th degree) dan pakar Surgical (3rd degree). 3rd degree repair biasanya dijalankan oleh trained obstetric. Sekiranya 4th degree, akan dijalankan oleh senior obstetric/urogyne atau colorectal surgeon, if available.

S: Sekiranya kecederaan tersebut berulang terhadap Plaintif, bolehkan Plaintif kembali pulih seperti sedia kala? A

J: Sekiranya pesakit mengalami 3rd degree perineal injury dan telah dibaiki, plaintif berisiko mengalami masalah yang sama sekiranya melahirkan anak secara vaginal dan kecederaan yang berulang boleh menyebabkan fungsi anal sphincter tidak pulih seperti sediakala B

S: Adakah sebarang rawatan/prosedur yang boleh dijalani oleh Plaintif untuk kembali seperti sediakala? Jika ada, apakah ia?

J: Plaintif boleh menjalani pembedahan redo sphincter repair, gracilloplasty or sacral neuromodulation. C

[26] DW1 was asked in cross-examination whether the third-degree tears could have been caused by fundal pushing *ie*, delivery pushing during childbirth. She replied in the affirmative. However, when the doctor was asked whether the technique of fundal pushing was inappropriate to be employed during delivery, she could not give a positive reply as she said this D question should be addressed to an obstetric & gynaecologist instead. Although DW1 gave evidence to suggest that the injuries suffered by the plaintiff were normal, nevertheless, in her evidence above she admitted that the third-degree tear did not heal as it should have. It was her opinion that the plaintiff may be end up using the stoma bag permanently if the E graciloplasty and SN failed. She stated further:

S: Dalam hal ini, boleh Dr terangkan berapakah kos yang perlu ditanggung oleh Plaintif untuk membolehkan prosedur kolostomi ini dilakukan?

J: Pembedahan jenis C untuk kelas tiga RM50.00 dan Kelas Satu RM1200.00 di Hospital Kerajaan (KKM). F

S: Selepas melakukan prosedur kolostomi ini, apa pula kos-kos yang perlu ditanggung oleh Plaintif (post procedure cost)?

J: Kos membeli stoma bag. G

S: Lanjutan dari soalan perenggan 36, boleh Dr terangkan berapakah perincian kos yang perlu ditanggung oleh Plaintif?

J: Stoma bag yang perlu diganti setiap 3-5 hari Pelbagai jenis stoma bag samada 'single piece atau double' dengan harga berlainan mengikut brand. Kos sekeping stoma bag lebih dari RM10.00. H Pesakit kadang kadang memerlukan accessory seperti bedak atau cream untuk rawatan luka stoma. Secara purata minimum kos untuk stoma adalah RM200.00 sebulan.

S: Adakah terdapat lagi apa-apa kos lain pada pandangan DR selain yang Dr terangkan tadi? I

J: Plaintif perlu rawatan lanjut untuk masalah 'incontinent'. Rawatan stoma untuk membenarkan luka perineum sembuh. Sekiranya plaintif masih mengalami 'incontinent', perlu pemeriksaan lanjut seperti endoanal ultrasound dan juga manometry untuk menilai tahap kecederaan sphincter plaintif. Jika sphincter plaintif masih tidak berfungsi maka perlu pembedahan lanjut seperti sphincter repair, gracilloplasty or sacral neuromodulation.

[27] As the defendants had admitted liability, the court made the assessment of damages based on all the evidence before it. This included submissions by the parties and consideration of case laws submitted to support their case. I could not agree with some of the case laws cited by the defendants as they were not on point as the case before me. In the case referred to by the plaintiff, *Nur Syarafina Sa'ari v. Kerajaan Malaysia & Ors* [2019] 9 CLJ 246; [2019] 12 MLJ 741, the facts were slightly different although the category of injuries was the same. I sought guidance from that case when deciding the case before me, as there were a number of principles distilled by the learned JC (as she then was) which were useful in situations where the courts differ in their opinions. The facts of the case stated below are as per summarised in the law journal.

[28] In *Nur Syarafina*'s case, the plaintiff claimed for medical negligence in respect of an injury she suffered during the birth of her first child at Hospital Bentong and the subsequent medical treatment she received at Hospital Temerloh. The plaintiff suffered a third to fourth degree perineal tear during the delivery of her baby. She was sutured by the doctors at Hospital Bentong and discharged the next day on 8 March 2014. The plaintiff's baby also suffered injury during the delivery. She suffered asphyxia and underwent resuscitation and recovery in the neonatal intensive care unit. The baby was transferred from Hospital Bentong to Hospital Temerloh on the day of her birth.

[29] After discharging the plaintiff, there was no follow-up treatment and the plaintiff's injury resulted in an infection, where the plaintiff was diagnosed to be suffering from an abnormal passageway between her vagina and her anus. The plaintiff was then referred to Hospital Selayang. On 22 May 2014, the plaintiff was seen by Dr Wong Sze Ming ('SP1'), a general and colorectal surgeon at Hospital Selayang. She was found to have 'a thin tissue between the fistula opening in vagina and anus, 0.5cm. A 1cm opening in the lower end of the vagina'. SP1 testified that he had to treat the infection first before undertaking the surgical repair on the plaintiff.

[30] On 1 June 2014, the plaintiff was admitted to Hospital Selayang for 'repair of anovaginal fistula KIV colostomy'. SP1 carried out the rectovaginal repair and sigmoid colostomy on the next day. In undertaking the sphincter repair, SP1 performed a colostomy on the plaintiff, which involved making 'a small cut in the abdomen and the intestinal is pulled out

and an opening is made in it. The intestine is sutured to the abdominal wall'. SPI testified that he does not normally perform a colostomy for sphincter repair. However, SP1 said that a colostomy was necessary in the plaintiff's case as "the defect involved almost the whole of the anal sphincter muscle. The repair was complex and hence a colostomy was needed. If colostomy was not done, the repair might break down. Normally, I do not routinely do a colostomy for sphincter repair". She was discharged on 6 June 2014. On 14 July 2014, the plaintiff underwent a reversal of colostomy, which was carried out by SP1. The plaintiff was discharged from Hospital Selayang on 18 July 2014. SP1 subsequently left the employ of Hospital Selayang for Tropicana Medical Centre, a private hospital. SP1 saw the plaintiff at Tropicana Medical Centre on 6 September 2014 and treated her with antibiotics. He last saw her on 2 February 2015.

[31] At the case management before the court, the defendants admitted liability in respect of the plaintiff's claim and judgment was recorded on 30 August 2017. The plaintiff claimed for special, general and aggravated damages. The learned JC, YA Dato Faizah Jamaluddin (as she then was), allowed the claims and awarded damages and costs subject to allocatur fee. It was held as follows:

(1) It was unrealistic to expect a claimant to collect and file all bills and receipts with a view to bringing a claim. As long as there was oral testimony to support the expense and the expense could be reasonably expected to be incurred due to the circumstances of the case, the courts have allowed the claim for special damages (see para 24).

(2) It was justified for the plaintiff to seek follow-up treatment from PW1 at Tropicana Medical Centre as PW1 was the main surgeon who treated her at Hospital Selayang and would know her condition better. The medical charges were also reasonable as it was less than one-third of the normal hospital charge (see paras 27-30).

(3) All the plaintiff's trips were necessary to obtain medical treatment for her injury and the plaintiff's husband's trips were necessary to assist the plaintiff to deliver mother's milk to the new born baby while the plaintiff was in hospital. However, the plaintiff's brother's and his wife's trip were not necessary (see paras 32-34).

(4) The plaintiff needed a special diet and supplements to avoid constipation. Taking into account the general cost of foods and supplements in Malaysia today, the court did not find the sum of RM100 offered by the defendants to be reasonable and the court found that the total amount of RM600 claimed by the plaintiff to be a reasonable amount (see paras 35-37).

(5) The plaintiff, on PW1's advice purchased special stockings and stoma bags from third party sources together with salt cleansing for her wounds and minimal medications. PW1 confirmed during the trial that RM740.70 was a reasonable estimate for the medical equipments. The court found that the amount claimed was reasonable (see paras 38-40).

(6) For her care at hospital, the court found that the sum of RM50 per day, instead of the RM150 claimed, to be reasonable. This was because the plaintiff was mobile and not bed-ridden. Also, she was able to feed and groom herself. In the circumstances, the court awarded the sum of RM750 for her care at hospital. The sum of RM500 per month was a reasonable sum for the cost of care that the plaintiff received from her mother at home. Therefore, the sum of RM5,500 was allowed for the plaintiff's care at home. Accordingly, the total sum allowed for the plaintiff's cost of care by her family members was RM6,460 (see paras 41-47).

(7) In the circumstances of her multiple stays in hospital and numerous trips to the hospital, the gross estimation of RM500 of telecommunication costs over the period of 12 months was reasonable. The plaintiff claimed the sum of RM400 for the medical reports. The sum was a reasonable expense incurred by a person for medical reports from three hospitals (see paras 49 & 51-52).

(8) In the circumstances and taking into account the conclusion reached by members of the board of inquiry in the internal inquiry report, the court found that it was foreseeable to the defendants that the plaintiff may be involved in legal proceedings against the hospitals and the doctors and nurses concerned. The court also found that it was reasonably foreseeable that the plaintiff would take all necessary steps to find out the extent of the defendants' actions and omissions and that she would incur expenses in the investigation and discovery of these facts prior to filing a claim under the tort of negligence against the defendants. The court found that the costs incurred for the pre-action discovery not to be remote and was accordingly recoverable by the plaintiff (see paras 56-59).

(9) Based on the defendants' admission of liability, the medical records and the internal inquiry report, the court believed and accepted the plaintiff's testimony. For this reason, the court awarded the global sum of RM80,000 for the pain and suffering and the loss of amenities of life suffered by the plaintiff caused by the defendants' negligence (see para 65).

(10) The withholding of information and the filing of the various proceedings in court would had also caused the plaintiff unnecessary distress. From the court's observation of her during the trial, she was neither sophisticated nor highly educated. And she was clearly overwhelmed and upset by the whole experience. Accordingly, in light of the conduct of the defendants in this present action, the court found that it was reasonable and appropriate for the court to award the plaintiff aggravated damages in the sum of RM200,000 (see paras 74 & 77).

[32] On the issue of seeking the best medical treatment, in her judgment, the learned JC stated the following:

[26] Learned Federal Counsel for the defendants relies on the Court of Appeal case of *Chai Yee Chong v. Lew Thai* [2004] 2 CLJ 321 and submits that the plaintiff should have continued her treatment at Hospital

Selayang and that her claim for private medical treatment is without basis. In the majority judgment in Chai Yee Chong, Abdul Hamid Mohamad and Mohd Noor Ahmad FCJJ held that:

> To summarise my view on the issue, every person has a right to seek medical treatment at a hospital of his choice be it at a government hospital or at a private hospital. But when it comes to awarding damages for such treatment, if the treatment is sought at a government hospital, the full amount expended and paid by the person should be awarded. But, if he seeks treatment at a private hospital, he has to prove, first that he is justified to seek treatment at a private hospital and, secondly, the amount incurred is reasonable. Regarding the first hurdle that he has to cross:
>
> (a) He must prove that that particular treatment is not available at the government hospital either due to the unavailability of the necessary equipment or qualified doctors or other sufficient reasons; or
>
> (b) He must prove that though the treatment is available at a general hospital, it is not available within a reasonable period considering the urgency of the treatment. This may be due to the congestion at the government hospital or for other sufficient reasons; or
>
> (c) He must prove that that the treatment at the government hospital though available, is grossly inadequate. This may be due to lack of trained doctors in that particular field or for some other good reasons. As pointed out by RK Nathan JC in *Chong Chee Kong* (*supra*) with whom I agree, we are concerned with treatment, not accommodation.

[33] Bearing in mind, the principle as stated by the Court of Appeal in the majority judgment of *Chai Yee Chong*'s case (*supra*), that every person has a right to seek medical treatment at a hospital of his choice, I have considered the submissions and case laws cited by the parties and have arrived at the following decision in respect of the costs of future treatment and various damages and costs claimed. The reasons are set out below:

General Damages

For Pain And Suffering And Loss Of Amenities Of Life

[34] Since the defendants had admitted liability for their negligence in handling the plaintiff's medical needs at the material time, it was only fair to award this head of damages to the plaintiff for all the pain, suffering and loss of amenities of life and depression suffered from the date of delivery. The court heard that the plaintiff was in no better position since that fateful day and the stoma bag had become an integral part of her life. In the case of *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885, the Federal Court held:

A [20] It is trite that damages serve as compensation, not a reward, less still a punishment. In assessing damages, the court should not be motivated by sympathy and award fair compensation based on cogent evidence. The court should not descend into a domain of speculation. The evaluation of those evidence, which form the basis of any risk of future damage, must therefore still be undertaken. And the trial judge can only evaluate
B such evidence based on the recognised balance of probabilities standard.

[35] The plaintiff asked for RM600,000 for the injuries suffered and RM100,000 for the mental trauma including disrupted sexual intimacy with her husband. The defendants submitted that an amount of RM80,000 for both (global sum) was fair. The court considered the evidence of the medical
C experts where everyone agreed that the injury was substantial because she had to undergo a sphincter repair within 24 hours of sustaining the injury and it has not healed since then. Although it was a normal injury during childbirth, the report concluded that "third degree perineal tear is a known complication of vaginal delivery and the causes are multi factorial. However,
D there were weaknesses in the management of and damage control measures that were undertaken to treat perineal tear that had brought about further complications for the patient ...".

[36] In the case of *Yang Salbiah & Anor v. Jamil Harun* [1981] CLJU 106; [1981] 1 LNS 106; [1981] 1 MLJ 292, the Federal Court held that the
E purpose of damages was to try so far as humanly possible to put the victim back to the position he would have been in but for the accident. A reasoned judgment must be given in support of the awards following legal principles and precedents. The damages must be fair, adequate and not excessive. Referring to *Nur Syarafina*'s case (*supra*), it was proved that the plaintiff:
F (i) could not be intimate with her husband for over a year; (ii) her career as a policewoman suffered owing to her prolonged sick leave; (iii) her first child was taken away from her after birth due to her hospitalisations; and (iv) she suffered general embarrassment and discomfort for over a year due to the injuries. In that case, the stoma was reversed and the plaintiff suffered
G discomfort for over a year only as compared to the plaintiff in the instant case, who was still on the stoma bag and she testified about the difficulties and embarrassments she had with it. She was a quality engineer in a company in Kamunting and now 32 years old and still with only one child. She had to be assigned to light duties for six months due to her condition.

H **[37]** The court also heard that the plaintiff suffered from depression. That was stated in the medical records. The plaintiff called PW4 to testify on this issue. PW4 confirmed that the plaintiff suffered depression wherein the result showed that she scored moderately high in the categories of sadness, pessimism, loss of pleasure, self-dislike, crying, loss of energy, concentration
I difficulty and tiredness or fatigue. She had undergone five psychotherapy sessions by the time the report was prepared on 20 April 2019 (refer to p. 366 of CBOD1). In Q&A30 of her witness statement marked as PSP1:

S30: Apakah kesan akibat kecederaan akibat daripada kecuaian pihak Defendan-Defendan yang Puan telah alami?

J: Saya berasa malu dan tekanan, serta kehidupan menjadi lebih susah akibat daripada najis-najis tidak dikawal. Ada banyak kali saya terpaksa untuk lari ke dalam tandas awam secara tergesa-gesa kerana najis-najis terkeluar dari badan saya ke dalam bag stoma terlalu banyak ataupun berlakunya kebocaran bag stoma.

Selain itu terdapat bau busuk najis dikeluarkan dari bag stoma pada setiap masa yang material, yang menyebabkan saya perlu menjauhkan diri daripada orang lain, bertempat di satu sudut yang tidak mempunyai orang dan/atau tidak mempunyai pengaliran angin yang kuat.

Saya juga dinasihati agar tidak untuk mengandung selagi tidak sembuh, di mana, aktiviti kelamin saya juga terjejas, dan saya tidak dapat menjawab kepada anak apabila anak ingin seorang adik lagi.

Selain itu, saya juga tidak dapat mendukung anak saya akibat daripada pemakaian bag stoma tersebut.

Selanjutnya terdapat ruam (rashes) di bahagian kulit yang bag stoma ditekatkan; dan saya bersasa sakit di bahagian kulit setiap kali apabila membuka lekatan bag stoma.

Permakaian bag stoma tersebut juga amat menyukarkan apabila saya bersolat kerana saya terpaksa memastikan dan membersihkan bag stoma dari najis setiap kali dan/atau mandi wajib sebelum menunaikan solat.

[38] She told the court that she could not care for her daughter while she was in hospital. Her sexual relationship with her husband also suffered due to her condition. In considering the proper amount for general damages, the court also looked at the plaintiff's oral evidence as follows:

Ok, selain daripada situ, masa saya pakai stoma bag iaitu pada hari ke saya dalam keadaan berpantang, ok. Ok. Waktu itu memang tak dapat nak uruskan, saya tak dapat nak uruskan anak saya dan saya terpaksa masuk hospital selepas dua minggu untuk memasang beg stoma dan terpaksa meninggalkan anak saya sampai seminggu. Dan saya paling rasakan kesan itu dekat anak saya sebab saya tak macam ibu-ibu lain.

Ok. Puan, di muka surat 15, Puan dinasihati, Puan telah menyatakan, 'Saya juga dinasihati agar tidak untuk mengandung selagi tidak sembuh.' Soalan saya, adakah Puan mempunyai apa-apa, pernahkah Puan mengandung selepas itu?

Tidak.

Dan Puan telah menyatakan aktiviti kelamin telahpun terjejas.

Ya.

[39] Additionally, "... keadaan emosi saya yang tidak stabil kerana terlalu banyak treatment yang perlu saya lalui dan doktor tersebut juga ada membuat satu referral ke psikologi." PW4's evidence corroborated the plaintiff's where she stated, 'sadness, present loss of pressure, self-dislike, crying, loss of energy dan concentration'. The physical and mental anguish and disabilities, then and now, for all the ordeal she had to endure as well as not knowing what lies ahead in regard to her condition and whether she will be put back to the position she would have been in but for the accident. Therefore, these are the justifications for the court award of RM1,000,000 for general damages for pain and suffering and loss of amenities of life. The amount may not be enough to compensate her, but it is hoped that it would help to alleviate her sufferings.

Costs Of Future Medical Treatment

[40] Under this head of general damages, the court has weighed the evidence of the medical experts in respect of the graciloplasty and SN device that was suggested to improve the plaintiff's condition because the graciloplasty on its own was not successful. In regard to this treatment, the plaintiff prayed for costs of RM65,000 to RM100,000 whereas the defendants submitted it should be rejected because the method was not proven successful. On this note, PW9's evidence as against DWI's evidence was more probable on a balance of probabilities because even DW1 admitted that it was an option to be tried where if it failed, the plaintiff would be on the stoma bag for life. DW1 testified that the SN method had never been conducted in Malaysia. Hence, there was no available data to compare. In her opinion, although the SN was a more advanced pacemaker device, it was her opinion that a nerve stimulator was a better option and therefore, there was a need to re-do the anal sphincter repair. However, PW9's evidence was more convincing to the court and there were doctors in Malaysia who could carry out that operation. Moreover, the plaintiff should be given the chance to return to her normal life; due to her young age, she should be able to have more children if the pacemaker is successfully employed. PW9's evidence was also that to re-do the anal sphincter was no longer an option since it was not feasible.

[41] Therefore, the court finds that the use of the SN method is the next step towards putting the plaintiff back in the position she had been but for the accident. Both PW9 and DW1 stated that the operation could be carried out at PPUM, hence, there are costs savings when it is done locally instead of sending the plaintiff abroad to have the operation to insert the pacemaker. The total costs allowed for this purpose, including for testing of the pacemaker, is RM100,000. If it is unsuccessful, the plaintiff is given liberty to apply to remove the pacemaker and undergo a second defunctioning sigmoid colostomy, and for costs of the stoma bags and its incidentals.

Removal Of The Stoma Bag

[42] This procedure is necessary when the court has allowed the pacemaker to be procured for the plaintiff's use. The plaintiff asked for RM12,000 to RM15,000 for this purpose. However, the defendants submitted that the costs can be halved as the procedure could be done at government hospitals. The court agrees with the defendants on this point. Therefore, cost of RM6,000 is awarded, which is half of the minimum estimate by PW9.

Costs Of Stoma Bags Pending The Implant Of The Pacemaker

[43] This cost is necessary while waiting for the procurement and testing of the pacemaker as well as the surgery to implant it. The defendants suggested costs of RM300 per month. The court allowed costs of RM300 for 12 months, *ie*, RM3,600.

[44] It is also necessary at this stage to work out the multiplier for the calculation of costs of the stoma bags in the event that the SN method employed is unsuccessful on the plaintiff. She is now 32 years' old. Using the conservative figures submitted by the defendants, the plaintiff's average life span may reach 75 (Abridged Life Tables 2020-2022). The court should consider 1/3 deduction from the average life span for any contingencies (see *Bujang Mat & Anor v. Lai Tzen Hai & Anor* [2004] 4 CLJ 127; [2004] 6 MLJ 376). The calculation is as follows:

75 - 32 = 43 years x 1/3 = 14.33/14 43 - 14 = 29 years

RM300 x 12 months x 29 years = RM104,400

Travel Costs To Sunway Medical Center For Follow-up

[45] The plaintiff prayed for costs of RM3,598 for future consultations. The defendants opposed it as it was already covered (tuntutan bertindih). The court agreed with the defendants.

Costs To Re-do Anal Sphincter And Closure Of The Stoma

[46] The plaintiff requested that provision be made for this operation to the amount of RM35,000. However, the defendants submitted that there was no justification for it to be done at a private hospital when the operation can be carried out in government hospitals. The court agreed with the defendants on this point.

Pain And Suffering For Anal Sphincter Repair, Closure Of Stoma And Pacemaker Implant

[47] The plaintiff prayed for RM75,000 to provide for these operations or procedures. However, there was no justification for it as stated above. The defendants prayed for this claim to be rejected as it was a presumptive claim. The court agreed with the defendants.

Aggravated Damages And Exemplary Damages

[48] The plaintiff claimed for both aggravated and exemplary damages. Under aggravated damages, the plaintiff prayed for RM300,000 for the sufferings she had endured because of the unreasonable conduct of the defendants. She also prayed for exemplary damages of RM1,000,000. For instance, she had to wait for a long time to obtain her medical reports and when after filing the suit, the defendants still withheld the documents. The plaintiff also testified in her witness statement as follows:

S5: Sila nyatakan apakah yang berlaku ketika anda melahirkan anak pada 3.5.2017?

J: Pada 3 May 2017, saya tetah dimasukkan ke Hospital Taiping untuk melahirkan anak sulung pertama. Proses kelahiran anak saya tersebut dilakukan oleh dua (2) orang doktor pelatih dengan hanya pemantauan seorang jururawat prempuan di labour room. (Rujuk: ikatan Dokumen Bersama (Jilid 1) (IDB-I, ms 325-329) Semasa proses kelahiran tersebut, setelah saya cuba untuk melahirkan anak saya tersebut secara semula jadi tetapi, tidak berjaya dan saya tetah tidak larat untuk meneruskan proses kelahiran secara semula jadi, saya telah minta jururawat tersebut bahawa saya ingin melahirkan anak saya secara cesarean, di mana jururawat tersebut tidak membenarkan saya melahirkan anak saya secara cesarean dengan beliau membalas saya dengan katanya, "Rugi kalau operate sebab ini anak sulung".

Selepas itu, atas arahan jururawat tersebut, perut saya telah ditekan oleh dua (2) orang doktor pelatih lelaki tersebut untuk membantu dan/atau mempercepatkan proses kelahiran bayi saya pada masa tersebut

Sejurus selepas anak saya telah dilahirkan, saya nampak reaksi salah seorang doktor pelatih lelaki tersebut yang memeriksa bahagian kemaluan saya nampak terkejut dan beliau telah memberitahu sesuatu kepada jururawat tersebut, di mana jururawat tersebut menyatakan, "tak apa, kita boleh jawab".

Pada masa tersebut, salah seorang daripada pihak Defendan-Defendan cuma memberitahu saya ada koyakan yang besar yang memerlukan jahitan dan bius di bilik pembedahan tanpa memberitahu dan/atau menjelaskan kepada saya situasi yang sebenar.

S7: Apakah yang telah berlaku akibat selepas pengambilan lactulose tersebut?

J: Akibat pengambilan lactulose tersebut, saya mula cirit birit tanpa henti. Apabila saya minta kain lampin daripada jururawat yang bertugas di wad-wad katil, jururawat memberitahu saya bahawa kain lampin tidak disediakan dan saya dan anak saya terpaksa tidur bersama di atas najis-najis sehingga keesokan pagi (5.05.2017) baru dapat membersihkan diri (Rujuk: IDB-I, ms 85)

> Semasa saya hendak pergi ke tandas dari wad katil, saya tidak dapat menahan najis-najis saya daripada keluar sehingga jatuh ke lantai.
>
> Kejadian ini menyebabkan saya berasa sangat tertekan dan amat memalukan kerana saya terpaksa tidur di atas najis-najis saya semalaman dan terdapat najis-najis jatuh dari dubur saya semasa perjalanan saya ke tandas dari wad katil.

[49] Based on the above evidence, the court did not find that exemplary damages were justified and would not go so far as to say that the defendants had the requisite intention to act in bad faith against the plaintiff. It appeared that the defendants' employees (as identified in the report) did not have the right credentialing to carry out the sphincter repair in the first instance after the injury was first reported, and the injury could have been due to the employees of the defendants' misjudgment or mishandling of the delivery process. However, there was evidence in the same report that they have acted or behaved inappropriately which led to the negligence and injury suffered by the plaintiff.

[50] In the case of *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427; [2018] 3 MLJ 281, the Federal Court discussed the appropriateness of awarding aggravated damages in medical negligence cases. It was held that there was no reason to exclude it from medical negligence cases as real personal injury was suffered by the plaintiff. The apex court also upheld the High Court's award of RM1,000,000 for aggravated damages against the defendants. The aggravated damages, *inter alia*, were awarded for subjecting the plaintiff to unnecessary operation which ultimately caused the plaintiff to lose his eyesight. The defendants were negligent in their advice of risks, diagnosis and treatment of the plaintiff. In *Mohd Ridzwan Abdul Razak v. Asmah Hj Mohd Nor* [2016] 6 CLJ 346, which was a defamation suit involving a sexual harassment allegation, the Federal Court held that 'in appropriate cases, substantial damages may be awarded for indignity, discomfort or inconvenience suffered; even aggravated damages may be awarded in light of the motive or conduct of the tortfeasor'.

[51] The defendants submitted that both claims must be rejected as there was no basis for such claims. It was argued by the Senior Federal Counsel that the defendants certainly had no intention to act with *mala fide* against the plaintiff and that being a public hospital, they did not have a choice of turning away patients, unlike their counterparts in the private hospitals that operate on profit basis. The court could not accept such argument as it would send the wrong message to the public hospitals that it was alright to give substandard treatments to their patients and then claimed they were overworked and underpaid.

[52] It was further submitted that aggravated damages, if the court was mindful to award it, should be only for RM50,000 because the defendants had carried out perineal repair, colostomy and graciloplasty on the plaintiff. On this point too, the court viewed that the defendants owed a duty of care to the plaintiff as soon as she stepped into the hospital, regardless of how many treatments were given to her. In the case of *Liong Thoo v. Sawiyah Hj Sirat & Ors* [1981] CLJ 126; [1981] CLJ (Rep) 171, the High Court held that the defendants' wrong had created a need for the services. Although that case is not squarely on all fours with this case, by comparison, if the defendants had not breached their duty of care, the plaintiff would not need to undergo the operations and procedures. Therefore, based on the authorities above and the facts of the present case, the court found that aggravated damages in the amount of RM300,000 was justified to be awarded against the defendants.

Special Damages

[53] It is trite law that special damages must be pleaded and particularised, and such damages must be proved by either oral or documentary evidence: *Abda Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd* [2001] 8 CLJ 1; [2001] 3 MLJ 64 and *Nur Syarafina*'s case (*supra*). In this case, the plaintiff's claim under the head of special damages were for medical expenses, cost of care (incurred by family members), cost of travelling, cost of preparation and attending court, supplements, cost of medical reports and cost of obtaining the medical reports. Nowadays, courts recognise it would be unrealistic to expect a potential plaintiff to keep all bills and receipts with a view to filing an action in court. It is not unreasonable for the courts to accept oral testimony to support such expenses claimed: *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825.

[54] Based on settled cases, the court decided it is the right of a person to seek a second or third medical opinion for his or her problem. More so in this case it involved a less talked about but no less important organ of the human anatomy: *Nur Syarafina*'s case (*supra*). The amount claimed for expenses paid must also be reasonable: *Sheela Christina Nair v. Regency Specialist Hospital Sdn Bhd & Ors* [2016] 9 CLJ 267; [2016] MLJU 1899. It is also settled law that care provided by family members ought to be assessed and awarded as the cost of care in personal injury cases: see *Liong Thoo*'s case (*supra*).

[55] The following are the special damages that the court allowed in respect of the plaintiff's claim under this head:

No.	Details	Amount
Special Damages incurred before the suit was filed		
1.	Expenses incurred for treatments and medication at the following hospitals - Hospital Taiping: RM80.00 + RM40.00 + RM50.00 = RM170.00 Columbia Asia: RM66.80 + RM300.00 = RM366.80 Adventist Hospital = RM127.20 Hospital Sultanah Bahiyah = N/A PPUM = RM4,500.80 HRPB Ipoh = RM55.00	RM5,219.80
2.	Travelling expenses from the plaintiff's house in Taiping to the said hospitals - plaintiff claimed RM8,852.84 - Court agreed with the defendants' submission that the amount must be reasonable and therefore awarded RM4,000.00	RM4,000.00
3.	Costs of stoma bag, adhesives and its care products - Costs incurred up until the date of filing of the suit - Claims allowed in full	RM2,934.50
4.	Procurement costs form medical records	N/A
5.	Visiting costs - incurred by family members when visiting plaintiff in hospital	N/A
6.	Caregiver costs by immediate family member(s) - RM1000.00 for 12 months - The Court found that this was a reasonable claim as the plaintiff was unable to care for her baby in her injured condition after the birth for at least 3 months - Plainitff's husband had own business earning about RM100.00-RM150.00 per day and he had to take time out to care for her - Nur Syarafina's Case - found that RM500.00 per month was reasonable instead of RM150.00 - This court allowed RM500.00 per month for 3 months	RM1,500.00

7.	Nutrition costs - In *Nur Syarafina*'s Case - the court found that this claim was reasonable to supplement the nutritional needs of the patient - This court allowed RM180.00 as claimed by the plaintiff	RM180.00
8.	Dr. Milton Lum Siew Wah's preparation costs of the medical opinion report - The plaintiff claimed RM6,100.00 - The defendants proposed that this amount be rejected by the court - The court agreed with the plaintiff that the amount was claimable as decided by case laws: *Nur Syarafina*'s Case - PW5 also waived part of his fees for court attendance during MCO	RM6,100.00
	Total	RM19,934.30
Special Damages incurred after the suit was filed		
1.	Wang Pos (postal order) for attendance in court for plaintiffs' witnesses except PW6 - PW6 did not know what was the payment for and the court did not allow the claim - RM100.00 + RM100.00 + RM150.00 + RM150.00 + RM200.00 (Dr Nora) = RM700.00	RM700.00
2.	Solicitors attendance in court	RM7,500.00
3.	Attendance in court for expert witness (PW5) including via Zoom RM3,250.00 (SP5) + RM3,250 = RM6,500.00	RM6,500.00
4.	Preparation for attendance in court for expert witness (PW9) - The court allowed the claims in the amount of RM5,000 + RM5,000 + RM1,000 = RM11,000.00	RM11,000.00

5.	Advocacy costs - plaintiff sought RM75,000.00 as legal fees of the solicitors - the complexity of preparation of this matter and many consultations and substantive work done - total of 7 doctors called to testify - defendants submitted that the case was initiated by the plaintiff and she should bear the costs - The court allowed RM50,000.00 for advocacy costs	RM50,000.00
6.	Pre-action discovery - Application for discovery of documents by the defendants - plaintiff prayed for costs of RM10,000.00 - The court disallowed this claim	Nil
	Total	RM75,700.00

[56] In *Nur Syarafina*'s case, the court stated the following in respect of the claim for pre-action discovery:

> [56] In determining whether the plaintiff should be awarded costs for the pre- action discovery, the question to be decided by this court is whether it was foreseeable to the defendants that the plaintiff might bring legal action against them for the injuries that she had suffered as a result of the defendants' actions and/or omissions. McGregor on Damages states that "it is necessary for the claimant to show that the defendant could reasonably have foreseen that the claimant might become involved in legal proceeding with a third party." It cites the case of Morton-Norwich *Products v. Intercen* (No. 2) [1981] FSR 337, where in an action for infringement of patent, the claimants successfully recovered as damages, the costs incurred in bringing a discovery action against HM customs since it was held "to be reasonably foreseeable to the defendant infringers that the claimant would take all necessary steps to find out the extent of the defendant's activities and thereby incur expense in investigation and discovery of the full facts.
>
> ...
>
> [58] In the circumstances and taking into account the conclusion reached by members of the board of inquiry in the internal inquiry report, I find that it was foreseeable to the defendants that the plaintiff may be involved in legal proceedings against the hospitals and the doctors and nurses concerned. I also find that it was reasonably foreseeable that the plaintiff would take all necessary steps to find out the extent of the defendants' actions and omissions and that she would incur expenses in the investigation and discovery of these facts prior to filing a claim under the tort of negligence against the defendants.

[57] In the case of *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825, the learned JC Vazeer Alam Mydin Meera (as he then was) decided:

> If access is withheld unreasonably and the patient is to put to cost and expense to procure a court order to compel production of the medical records, for instance under the provisions of O. 24 r. 7A of the Rules of Court 2102, then the patient would in such circumstance be entitled to cost on a solicitor-client basis.

Pursuant to the two cases cited above, this court ought to have allowed the claim for pre-action discovery in the amount of RM10,000.

Interests

[58] The court also awarded interests as follows:

(i) interest on general damages at the rate of 5% per annum from the date of filing of the writ on 30 April 2020 until the date of judgment on 19 January 2023;

(ii) interest on special damages at the rate of 2.5% per annum from the date of the incident 3 May 2017 until the date of judgment on 19 January 2023; and

(iii) interest on the judgment sum at the rate of 5% per annum from 3 May 2017 until full settlement.

[59] Costs of RM50,000 is awarded to the plaintiff as stated above.

[60] The judgment sum including interest are to be paid to the plaintiff's solicitors as stakeholders.

[61] For the avoidance of doubt, should the SN method employed be unsuccessful, the plaintiff is given the liberty to re-apply to remove the pacemaker and undergo a second defunctioning sigmoid colostomy and for costs of stoma bags as well as its incidentals.

Conclusion

[62] The court made the orders after finding that the plaintiff had proved her claims on a balance of probabilities.